

STEP ONE: INITIATE THE CONSULTATION PROCESS

Federal Law and the Definition of Undertaking

The responsibilities under federal law of the various parties involved in the protection of Historic Properties are defined in the National Historic Preservation Act (NHPA) as amended, Executive Order 11593 and the regulations of the Advisory Council on Historic Preservation (ACHP) (36 CFR 800, amended 2001). Federal agencies are required by the NHPA (Section 106) to take into account, during the planning process, the effects of their actions on Historic Properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on that agency consideration. The regulations given at 36 CFR 800 provide for consultation with the SHPO (and others, as described below) in the planning for federally sponsored, licensed, permitted, approved or funded projects. Agencies are directed under section 110 of the NHPA to identify and recognize Historic Properties under their management. Section 110 of the NHPA also requires that federal agencies consult with the SHPO in pursuance of their responsibilities under Section 106. The 36 CFR 800 regulations implement a review mechanism for undertakings, which federal agencies must comply with under Section 106 of the NHPA. Hence what we refer to here as the review and consultation process is often referred to as "Section 106 compliance."

The 1992 amendments to the NHPA (Section 301 16 U.S.C. 470w) define Undertakings requiring consideration under the NHPA as follows:

Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including -

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal Financial assistance;

(C) those requiring a Federal permit, license, or approval; and

(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

Clearly, as defined, undertakings can range from federal technical assistance projects, loan guarantees and property transfers, various special use permits, and 404 permits, on up to large-scale ground disturbing activities such as coal mining. The regulations further recognize the possibility that some if not many undertakings have no potential to affect Historic Properties. Placement of an ATM cash teller in a supermarket that is less than 50 years old is an obvious example. However, the potential for effects is not so easily assessed for all undertakings. Weed control projects in some areas, while not likely to affect most archaeological sites, could have the potential to negatively effect traditional plant gathering sites. The ACHP decided not to provide regulatory criteria in the present regulations but promises to provide supplementary guidance regarding undertakings and "the potential to affect" in the future. In the interim the SHPO *recommends* consultation as a proper means to assess potential to cause effects whenever there is some question. Many agencies and proponents routinely consult with SHPO informally regarding our opinion regarding an undertaking's

potential to cause effects. Most agencies that prepare environmental impact documents will address potential to cause effects to cultural resources in scoping or assessment documents. This information can be useful in determining appropriate consultation under Section 106 as well. If you are unsure whether you have an undertaking or are unsure if your undertaking has a potential to effect Historic Properties please contact the SHPO as early in your planning as possible.

Requirements for Consultation with Others

Once an agency has established that it has an undertaking and that the undertaking has the potential to affect Historic Properties, the agency needs to identify the appropriate SHPO (and/or Tribal Historic Preservation Officer or THPO), involve the public, and identify other consulting parties. Consultation with SHPO alone is not enough to ensure compliance with the NHPA or 36 CFR 800. Under the provisions of 36 CFR 800, federal agencies are required to seek and consider the views of state agencies, other federal agencies, Tribal Historic Preservation Offices, Indian Tribes, local and certified local governments (CLGs), local preservation groups, other interested parties and the public in their consultation regarding information needs and possible effects to Historic Properties. Federal agencies are also required under Section 110 of the NHPA to involve these same parties and the private sector in carrying out their preservation activities.

A number of Montana communities participate in the National Park Service Certified Local Government (CLG) Program and have local Preservation

Officers and commissions with associated local preservation ordinances that should be consulted in the section 106 process. A list of CLG contacts is found at Appendix 8.

Under 36 CFR 800 federal agencies are required to consult with tribes whether or not a tribe has appointed a Tribal Preservation Officer. A list of Tribal and Culture Committee contacts is found at Appendix 9.

Consultation with the public is an essential part of the initiation of the consultation process, and continues throughout the Section 106 process at different steps. The ACHP provides detailed guidance regarding public consultation in *Public Participation in Section 106 Review: A Guide for Agency Officials* (1989).

Consultation under State Laws: The Montana State Antiquities Act, the Montana Environmental Protection Act, and the Unmarked Burial Act and the Montana Repatriation Act

State agencies in Montana are required to consult with the SHPO by rules developed under the *Montana State Antiquities Act* (22-3-421 to 442) and the *Montana Environmental Protection Act* (MEPA - Environmental Impact Statements, Title 75, ch.1, part 2), concerning the identification and preservation of Heritage Properties. Under the Montana State Antiquities Act, state agencies are to consult with the SHPO regarding efforts "to avoid, whenever feasible, state actions or state assisted or licensed actions that substantially alter heritage properties...on lands owned by the state..." (MCA 22-3-424). Some state agencies have their own implementing regulations or rules for the Montana State

Antiquities Act - e.g. Department of Fish, Wildlife and Parks, and the Trust Lands Division of the Department of Natural Resources and Conservation. All other state agencies responsible for state lands, which do not have agency rules, must follow rules developed by the SHPO in 1998 (22-3-423 through 424 MCA).

The State Antiquities Act applies to projects on state lands only. It provides for the review of agency proposed projects and mitigation plans by the SHPO, the issuance of Antiquities Permits (required for the excavation, removal, or restoration of any Heritage Property on state lands), agency notification requirements to private landowners whose properties are being considered for Eligibility to the National Register by an agency, and an appeal process. Both state and federal agencies may request SHPO comments under certain sections of the State law. But all state agencies under the State Antiquities Act are required to consult with the SHPO regarding potential impacts to possible Heritage Properties on state lands.



It is also possible under the Montana Environmental Protection Act (MEPA) or specific agency regulations, that some permits, licenses, or reclamation applications could require review on non-

state land. Questions should be directed to the approving state agency. Some state agencies also must comply with Federal Section 106 regulations (for example Montana Dept. of Transportation work under the Federal Highways Administration) because they use federal funds, permitting or approvals.

The State also has an *Unmarked Burial Act* (22-3-801 through 811 MCA), which protects from disturbance all human remains not within recorded graveyards or cemeteries on both state and private lands. This law states:

22-3-802(e) preservation in place is the preferred policy for all human skeletal remains, burial sites, and burial materials.

The law further specifies rules for discovery, reporting requirements and review procedures, requires a permit for scientific analysis, and provides penalties for certain acts including knowingly destroying or allowing the disturbance of any unmarked burial or associated materials. All discoveries of human remains must be left in place and first reported to the county coroner, and following his examination, reported to the SHPO. Preservation in place is not always required, but the State Burial Board, created under the Act, is to be given the opportunity to consider that option. Remains should not be disturbed before Burial Board review unless required by the coroner during evaluation of a possible crime scene. Under state law any Human Remains and associated funerary objects not protected under the Unmarked Burial Act due to disturbance prior to 07/01/1991 are protected by the Montana Repatriation Act of 2001 (M.C.A.22-3-901 through 921). This act

requires agencies and museums to complete inventory of human remains and funerary objects, and provides for hearings regarding claims for culturally affiliated remains and objects covered by the act.

SHPO will provide copies of our administrative rules, the Montana Antiquities Act, the Unmarked Burial and the Repatriation Acts upon request.

Define Area of Potential Effect

Once an agency has determined that a proposed action is an "undertaking" under Federal law that has the potential to affect historic properties in Montana, consideration of and definition of the "Area of Potential Effect" logically follows. The Area of Potential Effect (or APE) is defined as:

...the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist (36 CFR 800.16(d))."

The Area of Potential Effect is not constrained by administrative boundaries, ownership, or to discretionary actions. An effect may be direct or indirect. Direct effects are caused by the action and occur at the same time and place. Indirect effects include those caused by the undertaking but that are later in time or further removed in distance, being reasonably foreseeable. The APE includes all locations where the undertaking may result in effects. It may or may not be the same as an area of impact as defined under the National Environmental Protection Act (NEPA), need not be a single area, and is determined by the potential that an undertaking could result

in changes anywhere that would affect historic properties that may be subsequently found to exist.

The APE is determined in consultation with the SHPO/THPO:

(a) Determine scope of identification efforts. The Agency official shall consult with the SHPO/THPO to:

(1) Determine and document the area of potential effects, as defined in §800.16(d); (36 CFR 800.4(a)(1))

Because the definition of the APE is critical to all later steps, we strongly recommend the earliest agency consultation with SHPO regarding the APE definition, the identification of known cultural resources within the APE, and the possible need for further identification efforts before conducting any field work or deciding no further identification efforts are warranted.

Similar considerations should be used to define the project area under State law (State Antiquities Act and MEPA) with the exception that in many cases considerations are confined to State Lands.

Assess information Needs in Consultation With SHPO and Others

In some cases the Federal or State agency may require its licensees, grantees or borrowers, or project proponents to initiate some of the agency's historic preservation responsibilities. In this document, we refer to **agency** responsibility even though the applicants or their professional consultants may be directly involved in interaction with the SHPO regarding cultural resource identification during the early stages of

project review.

Most Federal agencies and some state agencies have rules or procedures guiding their compliance with cultural resource requirements. It is possible that an agency has its own guidance, which does not appear to mesh well with the 36 CFR 800 regulations or this guidance document. When in doubt check with SHPO and we will attempt to work with the agency and its guidance to resolve any differences. 36 CFR 800 regulations determine SHPO procedures. Revised 36 CFR 800 regulations made final in 2001 greatly enhance the requirements for agency consultation with others during the initial stages of an undertaking. The public, THPO, tribes, local governments, other agencies, and all others with a recognized interest in cultural resources, which *might* exist in an APE, shall be consulted regarding information needs (36 CFR 800.3 -.4). Reasonable and good faith efforts to identify Historic Properties in an APE may include field survey, but may also include oral history interviews and consultation with others likely to have knowledge of, or concerns with, Historic Properties in the area. Agencies are responsible for seeking out information from Tribes about Historic Properties that might be affected, whether or not those properties are located on reservation lands (36 CFR 800:4). The SHPO may assist an agency in identifying parties to be consulted, but it is an agency responsibility to identify and consult with the appropriate parties.

File Search Requests

Most commonly, consultation is initiated with the SHPO with what we call a “File Search.” SHPO is happy to interact directly with agency designees, applicants and consultants at this stage in an effort

to expedite consideration. This often does save time, but success is dependent on agreement between SHPO and the agency designee on the APE and identification needs. In the event of disagreement, direct agency consultation will be necessary since consideration of effects to Historic Properties is an agency responsibility under Section 106 and 36 CFR 800. This responsibility cannot be legally delegated to others, with a very few exceptions specified in the law (e.g. Housing and Urban Development, CDBGs). If an agency authorizes a proponent to initiate consultation with the SHPO, the agency should so notify the SHPO (36 CFR 800.2(c)(4)).

When requested, the SHPO will review project plans and inform the agency or agency designee in writing of any historic, archaeological, or Traditional Cultural Property sites known to be in the project area, the results of earlier surveys in the project area or the lack of such survey information. SHPO may also recommend areas that warrant survey or other additional identification efforts to be made by cultural resource professionals.

At a minimum, the file search request will result in a review of recorded information on known historical and archaeological site locations and on past surveys. This information is maintained in two primary components of the SHPO State Antiquity Database - CRABS (Cultural Resource Annnotated Bibliography System) and CRIS (Cultural Resource Information System). The CRABS search will identify locations in the project area that may have received adequate previous survey, thereby providing background and eliminating unnecessary new survey expense. The CRIS search will identify all previously recorded cultural resource by

site type and township/range/quarter section. SHPO may also be able to provide additional information from its known site leads and the National Register files. Most land managing agencies also maintain site lead and unpublished survey files that should be consulted when an undertaking occurs on public lands.

The agency should allow 15 days for a SHPO response to a File Search request, although in most instances the response time is much less. In emergencies or under special circumstances, SHPO may be able to provide some preliminary information over the phone. However, SHPO considers telephone responses to inquiries as informational only. Phone conversations, because of the danger of misunderstandings, do not represent formal comment or consultation; and such verbal requests for information, comment or recommendation need to be followed up in writing. Faxes and email are accepted.

SHPO has a brief File Search Request Form, which will expedite our getting information back to the agency or their consultants (see Appendix 1). Whether using the form or not, the following information should be sent to the State Historic Preservation Office in initial requests for information and our recommendations (i.e., a file search request):

- < name, address and telephone number of requester
- < the name(s) of the federal or state agencies involved in the undertaking;
- < approximate date of proposed undertaking initiation;

- < a description of the undertaking. Be sure to identify and explain any work that will involve disturbance of the ground, or the demolition or modification of existing buildings. If no ground disturbance, or demolition or modification of existing buildings will take place, please say so;

- < a description of any previous disturbance and current land use and condition;

- < legal location of the project: Township, Range and Section information. (This should also be written on the maps.) Even city projects need this information because computer searches are based on township, range and section;

- < land ownership: federal /state / tribal/ private / other (explain)

- < a copy of the relevant USGS 7.5' quadrangle map showing the specific location of the project. (If the project is in a city, its location should also be shown on a city map.) The name of each map submitted for review must be indicated;

- < the APE should be defined, with rationale, and delineated on the 7.5' USGS map. Ancillary project locations such as access roads, borrow sources, staging areas etc. such be identified clearly;

- < if an agency such as HUD or their designees are requesting information because of proposed

demolition or rehabilitation of structures more than 50 years old, clear photographs (or excellent quality photocopies of photos) and an address will help us determine if the building is in the National Register files or if it has been recorded in a Historic District;

- < include a description of cultural resources known or suspected by the agency or applicant to exist in the APE.

Maps in the USGS 7.5-minute series now cover the entire state of Montana, though some are still provisional. These maps may be obtained from the United States Geological Survey, Map Distribution Center, Federal Center, Building 41, Box 25286, Denver, CO 80225; Phone (303) 236-7477. Some local sporting goods stores also stock USGS maps. They are also available in electronic form and can be downloaded from the State of Montana Natural Resource Information System website as well (nris.state.mt.us/gis).

Project information submitted by the agency or agency designee is not usually returned but is kept on file at the SHPO. Submission of incomplete, illegible or confusing project information will result in delay of the review process until accurate information is obtained. It is the responsibility of the agency or agency designee to provide the project information in a timely fashion. Faxed and electronic submissions will be reviewed under the same time frame as any other submission and with the same considerations of clarity and completeness.



About 53,000 sites and 35,000 inventory documents form the basis of CRIS and CRABS at this time. As new sites are recorded and inventories submitted during the review and consultation process the State Antiquities Database expands. Once the results of the SHPO file search are in hand, the SHPO will provide that information to the agency or designee, usually with a recommendation regarding the adequacy of information or the need for further identification efforts. Further recommended identification efforts may include a field survey or suggestions for consultation with particular Tribes or others knowledgeable about the area. Please refer to the Confidentiality section below concerning release and use of File Search information. *It is important to note that the simple lack of previously recorded sites in an APE does not mean that an agency can assume there are no Historic Properties present or that their identification efforts are complete.* In many cases, however, the SHPO may be able to recommend that a cultural resource survey is not necessary or other identification efforts are not warranted.

Under the regulations set out at 36 CFR 800.4 the agency shall consider SHPO and others' recommendations for

additional identification efforts. Recommended additional efforts to identify Historic Properties may include more background research, more consultation, oral history interviews, or field surveys. If, after receiving a SHPO recommendation for additional investigations the agency believes that additional consultation, inventory or other consideration of possible Historic Properties is not warranted, they should document a reasonable and good faith consideration of historic properties for further consultation (§800.4(d)). The documentation standards at 36 CFR 800.11(d) for a *Finding of No Historic Properties Affected* include: a description of the undertaking and federal involvement; a definition of the APE (with maps as necessary); steps taken to identify any cultural resources including persons, tribes and agencies consulted; and the basis for the finding that no properties are present or that none will be affected. Consultation with Tribes should not be seen as simply a matter of providing project information to the Tribes. It should be an active effort to learn about their concerns and include those concerns in agency planning. Consultation is meant to be an interactive movement towards a better solution.

Generally, SHPO will recommend survey in areas that have not been inventoried unless there are clear indications the APE has been previously heavily disturbed. In some cases, only a portion of the project will warrant inventory. Sensitive areas might include, but are not limited to, the following:

- < the actual locations of known sites, and the area around known sites;
- < areas around concentrations of

resources known to have been important to either historic or precontact populations;

- < an unsurveyed historic section of town;
- < areas of historic means of travel;
- < certain landforms within areas near present or past bodies of water (places where people were likely to live, camp, work or build);
- < areas on or around unusual or locally prominent landforms (places potentially used for burials, ceremonies or viewpoints); or
- < areas for which there is no official record of sites but for which there are artifact collections, or documents or other information indicating the probable presence of sites.

It is important to remember that as archaeologists and historians continue to survey the state, we gain new information as to high and low probability locations for sites. This may mean those geographic areas and types of landforms once thought to have a low potential for containing sites may actually have a higher potential for containing sites than previously realized and vice-versa. This change in information will ultimately be reflected in the project reviews. Thus, areas not requiring a survey at the present time or in the past may turn out to require a survey at some point in the future. Other areas formerly conceived to have high potential, may sub sequentially be determined to have low potential. Moreover, if existing previous inventory is more than ten years old, its usefulness will

need to be reviewed for changing standards, changing exposures of buried sites, and changing integrity of structures.

Since cultural resources are considered historic once they are 50 years old, some sites, buildings, structures or features, which were not recorded in the past, may have become historic in the intervening time and now require consideration. The passage of time may also call for a reassessment of cultural resources previously determined Eligible or Not Eligible (36 CFR 800.4(c)).



The following circumstances are examples where the SHPO will, in most instances, NOT recommend survey:

- < areas with previous adequate survey and reporting sufficient to document "no properties";
- < the project involves work only **in** an existing constructed road ditch, or road pavement and shoulders (note that a distinction is made between existing ditches/shoulders and the legal description of the right-of-way which may or may not be entirely disturbed);
- < temporary light fencing activities;
- < the project is located on artificial

embankment or fill/cut or other area previously substantially modified;

- < the project is located in an area or is of a type specified in a formal agreement recognizing its low potential to affect historic properties; or
- < the project itself is unlikely to affect cultural resources. Aerial chemical weed control projects might be an example.

These criteria are subject to reinterpretation and modification by the SHPO as the databases and our resource knowledge and understanding of potential impacts grows. For example, ground disturbance in plowed fields is a subject of ongoing review and discussion. Our current belief is that plowed fields warrant inventory except in areas of very limited soil deposition, for example on upland glacial till. While disturbing shallowly buried archaeological deposits, plowing may also reveal otherwise buried sites with intact cultural deposition below the plow zone. Another example where ideas about appropriate levels of inventory are in development is prescribed fire management. The impact of low intensity controlled burns on cultural resources is currently understood to be selective and therefore identification efforts may be directed only towards those resources that would likely be impacted by burning. At the same time, research is needed to better determine the range of impacts from prescribed burn. Moreover, in some cases while it may be that prescribed fires can be justifiably argued to have limited impact on certain kinds of sites, a "prescribed" fire that gets out of control may have significant impacts.

Conditions to control a prescribed fire must be met and promises kept before an agency can conclude that it has sufficiently considered the potential impact of prescribed fire on cultural resources. Failure to meet prescriptions or protection of cultural resources as stipulated in a prescribed fire plan would not constitute compliance.